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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1940.

No. 732.

H. J. JENKINS,
Petitioner,

vs.

JAMES M. KURN and JOHN G. LONSDALE, Trustees of the St. Louis-San Francisco Railway Company, a Corporation,
Respondents.

RESPONDENTS' BRIEF.

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RESPONDENTS' BRIEF.

OPINION OF THE COURT BELOW.

The opinion of the Supreme Court of Missouri is reported in 144 S. W. (2d) at page 76. (It is not yet reported in official reports.)

STATEMENT OF THE CASE.

Respondents deem it necessary to make a statement of the case for the reasons that the statement under the heading (A) in the Petition For Writ of Certiorari adopted by petitioner in his brief is insufficient in the particulars to which we shall refer, to give the court a full understanding of the facts.

In view of the issues as made by the pleadings and presented to the Supreme Court of Missouri, certain facts upon which petitioner lays emphasis are, in the opinion of respondents, immaterial.

The point of collision was on a reverse curve. Petitioner lays emphasis upon the fact that shortly after the train, of which he was fireman, passed the Walnut River Bridge, and when the train was approximately fourteen poles, or one-half mile, from the point of collision, the engineer might, for a brief interval, have seen the caboose of the standing train ahead. The witness V. A. Sinclair testified that from an observation subsequently made by him, one in the position of the engineer could for a distance of "only a few feet" have seen the track for a distance of approximately 175 or 200 feet immediately south of the Santa Fe railroad crossing (R. 158). That fact, however, is immaterial because nowhere in the petition was it alleged that the engineer could have seen the standing train and no negligence was alleged because of his failure to see the train.

One specific allegation of negligence in petitioner's petition was, in substance, that the engineer failed to keep a constant lookout for a special train, which he knew was ahead of him, and failed to have his train under control (R. 11), but it was not charged that he could at any time have seen this train. On the contrary, petitioner affirmatively testified that the engineer could not have seen it (R. 35, 68).

Petitioner has not, we believe, either in his petition or brief clearly stated the issue submitted to the jury in the trial court and to the Supreme Court of Missouri on appeal.

In his petition petitioner alleged some five specific allegations of negligence with which respondents were charged (R. 11, 12). When the case was submitted to the jury all of these, save one, were abandoned. The case was submit-

ted to the jury solely on the following specific allegation of negligence:

> "(d) In that said engineer in charge of said train No. 630 was further negligent in that after he was notified by plaintiff that the extra was standing on said track near said crossing, he failed to immediately apply the air in the emergency, to stop said train, which negligence created a dilemma of imminent peril, which forced plaintiff to jump from said train in order to save his life, or some bodily harm" (R. 11, 12, 167, 168).

Petitioner states that the Supreme Court of Missouri reversed the judgment "on the theory that petitioner's failure to make the engineer of respondents' train understand a warning of danger on the track ahead barred any recovery at all for the injuries resulting from respondent engineer's negligence." The Supreme Court in its opinion correctly states the issue, "Plaintiff's case was submitted on the theory that the engineer failed to exercise ordinary care to stop after notice by plaintiff of the danger ahead" (R. 191). Upon this issue it held, "The burden was on plaintiff to establish that he notified the engineer to go into emergency. He did not so notify him unless the engineer understood what was said, and there is not a scintilla of evidence that the engineer understood what plaintiff said" (R. 191). And, "Every word of plaintiff's evidence, on the point, tends to show that the engineer did not understand what plaintiff said" (R. 192).

Petitioner states that "failure of the fireman to give an adequate warning, or to give any warning to the engineer can, under the decisions of this court, only constitute contributory negligence, reducing rather than barring a recovery" (Petition 5). To this respondents cannot agree. We concede that if the evidence warranted the finding that the engineer was notified, that is to say, if he heard and

understood petitioner's warning, that the case was properly submitted to the jury and that the contributory negligence of petitioner would not bar his right of recovery.

Our position is that no negligence on the part of the engineer was shown, and absent that showing, there can be no recovery and the question of whether petitioner was guilty of contributory negligence becomes immaterial.

The engineer was charged only with failing to act after notice. He received no notice and consequently was guilty of no negligence.

Petitioner testified that after passing the Walnut River Bridge the engineer being on the outside of the curve could not see the standing train, and because of his inability to see, it then became petitioner's duty to keep the lookout (R. 68). He testified that when 10 to 15 car-lengths from the caboose, (he estimated 40 feet to the car (R. 70)) he saw the caboose of the standing train; that he "hollered" to the engineer to put the brake valve in emergency (R. 35, 71); that the engineer looked around—"He didn't do nothing; he looked like he thought I was joking with him or something" (R. 36). The engineer looked toward petitioner but did nothing and said nothing to indicate he understood what petitioner had said (R. 71, 72). The petitioner immediately left his seat box, the train having then moved about a car length or more since he called to the engineer, and went over to the engineer's side (R. 72). Although the engineer's action was clearly indicative of the fact that he had not understood what petitioner said, and although petitioner could see that the engineer had not applied the brakes and was doing nothing towards stopping the train, petitioner says he did nothing further toward warning the engineer (R. 72, 73, 74). When the engine was within two or three car lengths of the standing caboose, petitioner jumped, still without having said anything to the engineer.

It was about the time he jumped that the brakes were set in emergency and that was the first time when, as petitioner testified, the engineer could have seen the standing caboose (R. 74).

Petitioner in his statement says that respondents' witness testified that petitioner gave the engineer violent stop signals with his hands as he crossed the deck to jump (Petition 3). Petitioner testified that he did not signal with his hand; that aside from hollering to the engineer, "that is all I did" (R. 75). Respondents' witness Felton testified that when the engine was three or four car lengths from the caboose he saw petitioner leaving his seat; that "He run straight across the deck giving this stop signs with his hands, like that (indicating) and jumped out of the deck" (R. 118). Petitioner testified the engine was within two or three car lengths of the caboose when he jumped (R. 74). There is not a scintilla of evidence to warrant the finding that if, as petitioner denies but as Felton testified, petitioner then gave the engineer a signal by hand, the engineer could then have stopped the train before the collision. In addition to this, according to the testimony of Felton, petitioner jumped immediately after giving the signal and did not wait for any action on the part of the engineer, although petitioner testified that the brakes were applied about the time he jumped. The resulting collision is cogent proof that the signal by hand, if then given, could not have averted the collision.

SUMMARY OF ARGUMENT.

A. The sole issue in this case is whether there is any substantial evidence that the petitioner actually notified respondents' engineer of the peril, in time for the engineer to have thereafter stopped the train:

1. The sole allegation of negligence submitted to the jury was the failure of respondents' engineer to stop the train after being **notified** of the peril by the petitioner. The petitioner did not request the submission of any other allegations of negligence, and, therefore, all other allegations of negligence were and are now abandoned.

2. The petitioner was bound in the Supreme Court of Missouri and is bound in this Court by his trial theory.

3. The respondents did not, by reason of requesting Instruction "C", join with petitioner in submitting the case upon the erroneous theory that it was the duty of respondents' engineer to exercise due care to hear and understand petitioner's warning, because the trial court had refused defendants' peremptory instruction for a directed verdict; therefore, the respondents did not waive their right to now reassert that petitioner's theory is erroneous.

4. The question of petitioner's contributory negligence is not an issue in this case because there was no evidence of any negligence on the part of respondents under the pleadings and proof.

B. The burden rested upon petitioner to prove that he actually **notified** respondents' engineer of the danger. There is not even a scintilla of evidence in this case that petitioner **actually notified** respondents' engineer; that is, that respondents' engineer understood petitioner's warning and became aware of the peril in time to have stopped the train.

ARGUMENT.

Petitioner having here presented issues neither made by the pleadings, submitted to the jury, presented to nor decided by the Supreme Court of Missouri, it is important that we clearly understand the issues as presented by the record.

Where specific negligence is charged recovery may be had only upon proof of one or more of the acts of negligence so alleged.

Zasemowich v. American Mfg. Co. (Mo. Sup.), 213 S. W. 799, 802;
Yall v. Gillham, 187 Mo. 393, 408, 86 S. W. 125;
Gilliland v. Bondurant, 332 Mo. 881, 59 S. W. (2d) 679, 685;
Allen West Commission Co. v. Richter, 286 Mo. 691, 228 S. W. 827, 832.

Where two or more specific allegations of negligence are alleged and, as in the instant case, plaintiff requests that only one of these be submitted to the jury, the others are treated as having been abandoned and the case is thereafter considered as though the act of negligence submitted were the only one alleged.

Nahorski v. St. Louis E. T. R. Co., 310 Mo. 227, 274 S. W. 1025;
Crossno v. Terminal R. Assn. of St. Louis, 328 Mo. 826, 41 S. W. (2d) 796, 800;
Wallace v. Burkhart Mfg. Co., 319 Mo. 52, 3 S. W. (2d) 387, 390;
Denkman v. Prudential F. Co. (Mo. Sup.), 289 S. W. 591, 596.

Petitioner was bound in the Supreme Court of Missouri and is bound in this Court by his trial theory.

Degonia v. St. Louis, I. M. & S. R. Co., 224 Mo. 564, 588, 123 S. W. 807;

Duffley v. McCaskey (Mo. Sup.), 134 S. W. (2d) 62, 65;
O'Hara v. Laclede G. L. Co., 244 Mo. 395, 403, 148 S. W. 884;
Pinnell v. St. Louis-S. F. R. Co. (Mo. Sup.), 263 S. W. 182, 186;
Rath v. Knight (Mo. Sup.), 55 S. W. (2d) 682, 684.

This Court in Virginian R. Co. v. Mullens, 271 U. S. 220, 227, 228, said:

> "After bringing and trying the case on that theory the plaintiff cannot be permitted on this review to change to another which the defendant was not required to meet below."

The charge of negligence as laid in petitioner's petition and as submitted to the jury was that the engineer was negligent "**in that after he was notified by plaintiff** that the extra was standing on said track near said crossing, he failed to immediately apply the air in emergency, * * * " (R. 11, 12, 167, 168).

No negligence was predicated upon the failure of the engineer to be on the lookout for or in failing to see or hear a warning from petitioner as to the presence of the standing train ahead. Respondents are charged only with the negligent failure of the engineer to act "after he was notified" by petitioner.

The issue is not, as stated by petitioner, that the engineer should have anticipated the probability of a warning or signal from petitioner, nor that it was for the jury to say whether the engineer, in the exercise of due care, should have heard petitioner's warning. The issue is whether or not the engineer was notified. Did petitioner bring home to the engineer actual knowledge of the danger ahead?

Under the allegations of the petition the burden rested upon petitioner to prove notice, that is, actual knowledge.

To allege that one is notified of a fact is comparable to saying that knowledge of the fact was actually imparted and made known.

In Vinton v. Builders' and Manufacturers' Assn., 109 Ind. 351, 9 N. E. 177, 178, it was held:

> "The word 'notify' used in such section, is a compound word of Latin derivation, and its primary and literal meaning is 'to make known'."

In Fast v. Scruggs, 164 Oklahoma 196, 23 Pac. 2d 383, 386, the Court said:

> "Generally, the word 'notify' is defined as meaning to give notice to; to inform by words or writing in person or by message, or by any signs which are understood; to make known. 49 C. J. 570."
>
> "To notify one of a fact is to make it known to him, to inform him by notice. Huntington v. City of Calais, 105 Me. 144, 73 Atl. 829."

In Crosby v. Wells, 73 N. J. Law 790, 67 Atl. 295, 302, the Court defined the word "knowledge" as "the receiving of a mental impression, the state of being aware."

The case of Johnston v. Southern Ry. Co., 236 Ala. 184, 181 So. 253, 255, was one wherein the plaintiff sought to recover for the death of the driver of an automobile who drove his automobile into the side of a moving train. Negligence under the last clear chance doctrine was alleged upon the ground that the death was not caused by the original impact but by the fact that the deceased and his automobile were dragged for some distance and that the enginemen failed to stop the train after knowledge of the peril. In discussing the question of the quantum of proof necessary to establish knowledge, the Court said:

> " 'Knowledge of peril,' as an essential predicate for guilt of subsequent negligence, means actual knowledge, and not that imputed knowledge which is based

upon information merely of facts which, if followed up, would result in actual knowledge (Citing cases)."

The foregoing holding has peculiar application to the instant case because here negligence is not predicated upon failure to be on the look-out or watch for a warning, but upon failure to act "after notice."

Respondents concede that if the record warrants the finding that the engineer promptly heard and understood what petitioner said to him, and thereby knew of the danger ahead, then a question of fact for the jury was presented.

We contend, however, that under the record the Supreme Court of Missouri correctly held, "There is not even a scintilla of evidence that the engineer understood what plaintiff said" and, therefore, no case for the jury was made and the reversal of the judgment was warranted.

Instruction No. 2 given by the trial court on behalf of petitioner provides that if the jury found that "such notice was given in time for the engineer to make such emergency stop, then it was his duty to make such stop, if you find that the engineer understood the signal **or in the exercise of ordinary care could have so understood the signal**" (R. 167, 168). Respondents in the Supreme Court of Missouri assigned error in the giving of such instruction upon the ground that because of the inclusion of the latter clause above quoted, the instruction was broader than the pleading and thus erroneous.

Petitioner now asserts that respondents by their requested Instruction "C" (R. 174) joined with him in submitting the case upon the theory that it was the duty of the engineer to have heard and understood the warning if he could have done so by the exercise of ordinary care. In this, petitioner is in error. The well settled rule as announced by the decisions of the Supreme Court of Mis-

souri is that, where after the refusal of the trial court to adopt the defendant's theory as evidenced by the refusal to give the peremptory instruction for a directed verdict, the defendant may frame its instructions upon the theory adopted by the trial court without waiving its right to later assert that such theory is erroneous.

Everhart v. Bryson, 244 Mo. 507, 516, 517, 149 S. W. 307, 309;
Davis v. Chicago & E. I. Ry. Co., 338 Mo. 1248, 94 S. W. 2d 370, 373;
State ex rel. American School of Osteopathy v. Daues, 322 Mo. 991, 18 S. W. 2d 487, 490.

This point was urged by petitioner in the Supreme Court of Missouri but under the foregoing rule the court held in effect, at least, that by requesting their Instruction "C" respondents were not bound by petitioner's erroneous theory of his right of recovery under the issues made by the pleadings.

Petitioner lays much emphasis upon the fact that the engineer was in primary control of the movement of the train, and that it was his duty to have it under control. This we concede. The evidence, however, shows conclusively that the engineer had the train under control. Petitioner's very right to recover in this case, as submitted, must be upon the theory that the engineer did have it under control, because he charges, in effect, that if the engineer had acted upon notice he could and would have stopped the train before the collision occurred. Petitioner affirmatively testified that the train was running at approximately six miles per hour and that if the engineer had applied the brakes in emergency when he called to him, he could have stopped the train (R. 34, 38, 70).

Petitioner asserts that the engineer had the absolute duty to know that the track was clear and that the negligence

of petitioner was but contributory to that of the engineer. The statement is made by petitioner that the engineer could have seen the standing train when his engine was about one-half mile from the crossing. We assume petitioner has reference to the testimony of witness Sinclair, who testified that after the accident, from observations then made by him from the engineer's position in the cab of the engine at a point just east of the Walnut River Bridge, he could for the distance of only a few feet see the track approximately 175 or 200 feet south of the Santa Fe tracks (R. 158). While it was charged in the petition, in one specific allegation of negligence, later abandoned, that the engineer failed to keep a lookout, there is no allegation that the engineer could at any time have seen the standing train or that he was negligent in failing to see it. Petitioner testified that the engineer could not see the standing train because of the curve, and other obstructions, and for that reason it became his, petitioner's duty to keep the lookout and notify the engineer (R. 35, 68).

Petitioner says that he "did perform an act, warning, signalling or notifying respondents' engineer of the danger. If the doing of that act was not quite sufficient or if it were done in a manner not quite effective, all that petitioner can be guilty of is failing to perform to perfection a duty which is required from a very general rule and a duty in respect to which there is no measuring stick by which its adequacy or sufficiency can be judged." (Brief p. 25). The foregoing is a typical illustration of the fact that petitioner now seeks, as he did in the Supreme Court of Missouri, to recover upon a theory which he himself did not present by his pleading. There is in this connection a very definite measuring stick, one of petitioner's own creation—namely, notice to the engineer; not whether he gave a warning or performed some act which the engineer, in the exercise of due care should have understood, **but that**

he brought home to the engineer actual knowledge of the fact. The Supreme Court of Missouri correctly held that there was no proof of notice to the engineer. It did not hold that petitioner was guilty of contributory negligence and as a result thereof could not recover. The question of petitioner's contributory negligence was not involved.

The burden of proof rested upon petitioner to prove the negligence as alleged, namely, that he notified the engineer; that is, that the engineer heard and understood what he said. Proof of this fact cannot be left to mere speculation, guesswork or conjecture.

Southern R. Co. v. Walters, 284 U. S. 190, 194;
Atchison, T. & S. F. R. Co. v. Toops, 281 U. S. 351, 354;
Northwestern Pacific R. Co. v. Bobo, Administratrix, 290 U. S. 499, 502;
Gulf, M. & N. R. Co. v. Wells, 275 U. S. 455;
Chicago, M. & St. P. R. Co. v. Coogan, 271 U. S. 472, 478;
Evans v. Massman Const. Co., 343 Mo. 632, 122 S. W. 2d 924, 932;
Markley v. Kansas City Southern Ry. Co., 343 Mo. 632, 90 S. W. 2d 409, 413;
Grange v. Chicago & E. I. Ry. Co., 334 Mo. 1040, 69 S. W. 2d 955, 961;
Ducoulombier v. Thompson, 343 Mo. 991, 124 S. W. 2d 1105, 1110.

It is not sufficient that the proof show that petitioner "shouted" or spoke in a tone which the engineer should have heard. The engineer is not charged with failing to hear, but with failure to act after notice.

In support of his contention petitioner cites Gillis v. Atl. C. L. R. Co., 175 S. C. 223, 179 S. E. 62; Washington and Old Dominion R. Co. v. McPherson, 26 Fed. 2d 989, and Pennsylvania v. Shelley, 221 Federal 901. None of these cases is in point.

In the Gillis case, while the opinion does not refer to the specific negligence charged, it was shown that plaintiff gave the engineer a stop signal, and that the engineer understood that signal because the brakes were applied; but because he did not have the train under control he failed to stop the train and injured plaintiff.

In the Shelley case the negligence of the engineer was clearly shown and, having been shown, the Court held that the negligence of the plaintiff himself was not the sole proximate cause.

In the McPherson case the negligence relied upon was the failure of the motorman to keep a constant, vigilant lookout for signals and in failing to see a danger signal which was displayed and which the evidence showed he would have seen in the exercise of due care; while in the instant case the negligence alleged is not the failure to be on the lookout for the signal, but the failure to act after notice.

Petitioner refers to the fact that in the Gillis and McPherson cases certiorari was denied by this Court. This Court has frequently held that the denial of a writ of certiorari imports no expression of opinion on the merits of the case and is in no case equivalent to an affirmance of the decree that is sought to be reviewed.

> Atl. Coast L. R. Co. v. Powe, 283 U. S. 401, 403;
> United States v. Carver, et al, 260 U. S. 482, 490;
> Hamilton-Brown Shoe Co. v. Wolf Bros. & Co., 240 U. S. 251, 258.

The cases of Rocco v. Lehigh Valley R. Co., 288 U. S. 275; Union Pacific R. Co. v. Hadley, 246 U. S. 330 and Frese v. Chicago, B. & Q. R. Co., 263 U. S. 1, relied upon by petitioner are not in point because each involves the question of whether the negligence of the plaintiff was the sole proximate cause or merely the contributing cause. In

this case the question is, Was the engineer guilty of negligence as charged? If he was not, as we contend, then no liability may be imposed upon respondents.

Petitioner says that it was wholly unreasonable to require that the failure to give a warning in a particular way should bar petitioner's action. The Supreme Court of Missouri did not hold that petitioner was required to give a warning in a particular manner. It merely held that petitioner founded his cause of action upon a charge that the engineer was negligent in failing to act after he was notified of the danger by petitioner, and that petitioner had wholly failed to prove this fact.

In his statement of the case petitioner says "Respondent's witness testified that petitioner gave the engineer violent stop signals with his hands as he crossed the deck to jump (R. 118)". (Petition 3). This statement requires some further explanation of the facts developed in that connection. The witness Felton, to whom petitioner refers, testified that until the engine was within three or four car lengths of the caboose petitioner had his head turned to the left toward the fair grounds; that he was not looking ahead (R. 116, 117); that when the engine was three or four car lengths from the caboose petitioner left his seat box, ran straight across the deck "giving this stop signs with his hands, like that (indicating), and jumped out of the deck" (R. 118). Petitioner specifically denies that he gave any signal with his hands; he says that calling to the engineer was all that he did (R. 75). Under the rule of decision in Missouri, which will be respected by this court, a party cannot recover upon the testimony of his adversary when it is in conflict with his own testimony.

Elkin v. St. Louis Pub. Service Co., 335 Mo. 951, 74 S. W. 2d 600, 603;

State ex rel Weddle v. Trimble, et al, 331 Mo. 1, 52 S. W. 2d 864, 867.

Aside from that question, even if petitioner gave the engineer a hand signal, as testified to by Felton, thus notifying the engineer of the danger ahead, it gains petitioner nothing for the reason that Felton testified that the engine was then within three or four car lengths of the caboose and that immediately upon giving the signal, petitioner, without waiting for the engineer to act, jumped. There is no evidence that within that distance the train could have been stopped. Therefore, petitioner would not have been saved from injury had the engineer then set the brakes in emergency, and consequently such failure could not have been the proximate cause. In addition to this petitioner testified that about the time he jumped the engineer set the brakes in emergency (R. 76), and it was at that time that the engineer himself could have first seen and probably did see the caboose (R. 74, 76). The conduct of the engineer, as petitioner himself relates, in the face of certain danger to himself, demonstrates beyond the peradventure of a doubt that, although he may have looked toward petitioner, he did not hear, nor understand, what petitioner said. When petitioner called to him the engine was ten to fourteen car lengths from the caboose. Aside from looking toward petitioner the engineer did nothing. Within the distance of one car length petitioner got off of his seat box, walked over behind the engineer, saw that the engineer had not applied the brakes, and yet, according to his own statement, he did or said nothing more (R. 72, 74). The brakes were not applied until the engineer himself could see the caboose and they were applied as soon as the engineer could see it.

Under these facts, falling from the lips of the petitioner himself, there is no such inference as would warrant the jury in finding as a fact either that the engineer heard and understood petitioner's warning or knew of the peril. As said by the Supreme Court of Missouri, to impute such

knowledge to this engineer necessarily implies that "there can be no explanation for his failure to act, except that he was determined on suicide"? The presumption is to the contrary.

Petitioner, as an appendix to his brief, prints the opinion of the Supreme Court of Oklahoma in Kurn, et al, v. Reese, Administratrix, a suit for the death of the engineer. The opinion of the Supreme Court of Oklahoma in that case has not become final. It is, as we write this brief, pending upon appellant's motion for rehearing. The instant case must be decided upon its record, upon the testimony for which the petitioner himself vouches, and not upon the record made or the decision announced, but not yet final, in the Reese case.

It is respectfully submitted that the decision of the Supreme Court of Missouri should be affirmed.

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SUPREME COURT OF THE UNITED STATES.

No. 732.—October Term, 1940.

H. J. Jenkins, Petitioner, vs. James M. Kurn, et al., Respondents. } On Writ of Certiorari to the Supreme Court for the State of Missouri.

[May 5, 1941.]

Mr. Justice Murphy delivered the opinion of the Court.

When the interstate train on which he was fireman emerged from a curve on the outskirts of Winfield, Kansas, petitioner sighted a train standing not more than six hundred feet ahead on the same track. He shouted to the engineer to push the brake valve over in emergency. The engineer turned and looked at him but did nothing to arrest the movement of the train. Petitioner jumped from his seat, crossed the cab, and stood behind the engineer for a brief time but said nothing. When the engine was but two or three car lengths from the standing train, the engineer applied the brakes. At that moment petitioner leaped from the engine and landed in some rocks along the track. He sustained serious injuries and to recover damages brought the instant action under the Federal Employers' Liability Act (45 U. S. C. §§51-59) against respondents in a Missouri circuit court.

The complaint contained five counts charging negligence, but only the fourth was submitted to the jury. Count four alleged: "... that said engineer ... was further negligent in that after he was notified by [petitioner] that the [train] was standing on said track near said crossing, he failed to immediately apply the air in the emergency, to stop said train, which negligence created a dilemma of imminent peril, which forced [petitioner] to jump from said train in order to save his life, or some bodily harm."

The case was tried before a jury which returned a verdict of $12,000. From judgment in that amount entered for petitioner, respondents appealed, assigning various errors. Confining its attention to one, the Supreme Court of Missouri held that the circuit court should have granted respondents' motion for a directed verdict. It reversed the judgment but did not remand the cause for a new trial. 144 S. W. (2d) 76. We granted certiorari on March 10, 1941. 312 U. S. —.

It is conceded that the action was properly brought under the Federal Employers' Liability Act. The single question is whether the trial court correctly refused to direct a verdict for respondents.

In explanation of its conclusion that the trial court erred, the Supreme Court of Missouri observed: "The burden was on [petitioner] to establish that he notified the engineer to go into emergency. He did not so notify him unless the engineer understood what was said, and there is not even a scintilla of evidence that the engineer understood what [petitioner] said." In other words, not only must petitioner prove that he moved to warn the engineer of the impending danger, but he must prove the engineer's subjective comprehension and correct interpretation of that warning, verbal or otherwise. We cannot agree.

To be sure petitioner was required by the allegations of his complaint to prove that he acted promptly and reasonably to awaken the engineer to the danger ahead. Since the only count submitted to the jury charged that the engineer was negligent in failing to apply the brakes after notice of the train in front, petitioner was compelled also to prove that the notice was communicated to the engineer. But to establish the fact of communication petitioner had only to prove that the engineer should have comprehended the warning under the circumstances disclosed. He was not obligated to go further and produce evidence of the subjective reactions in the engineer's mind. The right of action conferred by § 51 is not to be burdened with impossible conditions.

There was evidence from which the jury could have concluded that if not subject to any physical disability the engineer would have comprehended petitioner's monition and understood that peril was imminent. Petitioner testified without contradiction that he "hollered" his warning loudly; that only a narrow space separated his perch from the engineer's seat; that the engineer's hearing was "all right"; that petitioner and the engineer could and did carry on "normal conversations" while the train was operating; and that there was comparatively little noise in the cab from the train.

Judged by the test outlined above, that evidence was ample to warrant submission of the issue to the jury. Since other questions which our decision does not touch were presented to the Supreme Court of Missouri, the judgment is reversed and the cause is remanded to that court for further proceedings not inconsistent with this opinion.

It is so ordered.